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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of the Commission's)
Rules Regarding Installment)
Payment Financing for Personal)
Communications Services (PCS))
Licensees)

WT Docket No. 97-82

To: The Commission

COMMENTS

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SUMMARY

Cook Inlet Region, Inc. ("CIRI") supports the Commission's efforts to provide opportunities for responsible entrepreneurs in the reauction of any returned broadband PCS C block spectrum. In particular, CIRI urges the Commission to apply the same broadband PCS C block eligibility rules — including the total assets test — to all applicants for the C block reauction on a current basis. The Commission should exclude from eligibility any parties that are in default on Commission installment payment obligations and limit bidding credits in the reauction to entities that are not delinquent on their payments. The Commission also should apply its well-justified C block tribal affiliation rule.

CIRI urges the Commission not to link any minimum opening bid levels to previous C block bids, many of which were excessive and are the root cause of the instant reauction. High minimum bids also could disadvantage smaller bidders and may force the Commission to reduce the bids during the auction, which is unfair to standing bidders. CIRI urges the Commission to utilize an objective population-based formula — such as that used for upfront payments — for any minimum bids.

Finally, CIRI supports the Commission's proposal to create a very small business category in its C block reauction rules. To compensate for the lack of installment payments, however, CIRI urges the Commission to increase the bidding credits for small businesses and very small businesses by 10 percentage points, just as the Commission did recently in the LMDS context.

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COMMENTS

Cook Inlet Region, Inc. ("CIRI"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, submits these Comments in response to the Further Notice of Proposed Rule Making, FCC 97-342 ("FNPRM"), released in the captioned proceeding on October 16, 1997.

I. INTRODUCTION

CIRI has long been an active supporter of responsibly managed government efforts to encourage minority and small business participation in the communications industry. In that context, CIRI participated in the Commission's broadband personal communications service ("PCS") C block auction, C block reauction, and D, E, and F block auction, winning fourteen C block licenses and seven F block licenses. CIRI completed and activated the first major market broadband PCS C block system in Tulsa, Oklahoma, in June, 1997. CIRI continues to develop its broadband PCS systems in other markets.

In connection with its participation in these auctions, CIRI has been active before the Commission regarding the terms,

conditions, and enforcement of its entrepreneur's block auction policies. In particular, CIRI filed a Petition for Rulemaking on May 7, 1997, urging the Commission to establish rules for the administration and disposition of its broadband PCS C block competitive bidding installment payment obligations. Now, CIRI urges the Commission to return to its goals of providing opportunities for responsible entrepreneurs in the reauction of any returned C block spectrum. The Commission has the opportunity in this context to revisit its C block auction and to avoid the concentration of licenses in the hands of a few large bidders. In doing so, the Commission can promote a constructive ending to an otherwise difficult auction process.

II. REAUCION ELIGIBILITY RULES

A. Financial Tests

As a threshold matter, CIRI supports the Commission's decision to "apply[] the same rules regarding eligibility that were used in the C block auction to the reauction of C block licenses."¹ The value and utility of the C block spectrum to be reaucted is heavily dependent on the licenses already in the hands of original C block bidders, and it is important that the Commission not materially alter the eligibility rules for these related auction events. C block investors and entrepreneurs should not be required to alter their bidding structures to participate in a reauction of original C block spectrum.

¹. FNPRM at ¶ 22 (footnote omitted).

It is equally important that the Commission apply the total assets test that governed admission to the original C block auctions. Section 24.709(a) of the Commission's Rules provides that:

No application is acceptable for filing and no license shall be granted for frequency block C or frequency block F, unless the applicant, together with its affiliates and persons or entities that hold interest in the applicant and their affiliates, have gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million at the time the applicant's short-form application (Form 175) is filed.²

Having applied this test to the original auction (and the subsequent reauction) of C block licenses, the Commission should not now make the benefits of C block bidding available to entities that otherwise would not qualify.

In this regard, CIRI urges the Commission not to admit all previous C block bidders or licensees to the pending reauction automatically without first determining their current eligibility to bid. An entity that does not qualify for the benefits of the Commission's entrepreneur's block rules should not be permitted to rely solely on prior eligibility to gain access to a Commission auction. Otherwise, the Commission may well provide scarce federal assistance to entities that no longer face the barriers that the entrepreneur's block rules were meant to overcome. For this reason, participants in the Small Business Administration's ("SBA's") 8(a) program³ are required to

² 47 C.F.R. § 24.709(a)(1) (emphasis added).

³ The Commission relied on the 8(a) regulatory scheme in crafting its broadband PCS entrepreneur's block rules.

"graduate" from the program when it is determined that they have met "the targets, objectives, and goals" of their business plans and have "attained the ability to compete in the marketplace without 8(a) program assistance."⁴

The Commission should apply a similar policy in connection with its entrepreneur's block auctions. Once an entity has gross revenues of more than \$125 million in each of the last two years or total assets of less than \$500 million at the time it files a short-form application (Form 175) for an auction, it should no longer qualify for entrepreneur's block preferences. In limiting the ability of larger C and F block licensees to continue winning entrepreneur's block broadband PCS spectrum, the Commission will give a greater number of responsible smaller parties the opportunity to become Commission licensees. The Commission will also create new strategic partnership opportunities for smaller businesses. In doing so, the Commission will advance the goal of disseminating licenses among a wide variety of applicants and will avoid extending valuable spectrum auction preferences to entities that no longer need the Commission's help.

⁴. 13 C.F.R. § 124.208.

B. Treatment of Defaulted or Delinquent Licensees

CIRI also urges the Commission to restrict participation in the C block reauction to entities that have neither defaulted on any Commission installment payment obligations⁵ nor sought bankruptcy protection. Licensees (and their affiliates⁶ and attributable investors⁷) that have failed to make good on prior agreements with the government should not be offered another Commission benefit in the form of admission to the set-aside C block reauction. The Commission must demonstrate that competitive bidding preferences will be limited to parties who in fact satisfy their obligations, regardless of the service to which those obligations apply.

This is particularly the case if the Commission does not offer installment payment plans in connection with the C block reauction. A smaller bidder who is now prepared to pay for C block licenses in full after the auction should be required to dedicate those funds to the satisfaction of an existing Commission competitive bidding obligation before adding new licenses to its collection. This holds true even if the Commission offers installment payment plans for existing or new C block licensees. The Debt Collection Improvement Act generally prohibits the provision of any federal loan to an entity that is

⁵. FNPRM at ¶ 84.

⁶. As defined in Section 24.720(1) of the Commission's Rules, 47 C.F.R. § 24.270(1).

⁷. As defined in Section 20.6(d) of the Commission's Rules, 47 C.F.R. § 20.6(d).

delinquent on any non-tax debt owed to a federal agency,⁸ and it would be nonsensical to offer new government financing to an entity that is not performing on an existing government loan. If the Commission's designated entity program is to survive, the Commission must make clear that its Rules and policies will be enforced in a variety of ways.

Moreover, CIRI urges the Commission to limit the availability of C block reauction bidding credits to entities that are not delinquent on other Commission installment payment obligations. As the Commission learned in the context of the debate regarding broadband PCS C block installment payment obligations, some parties reaped the benefits of small business bidding preferences in the F block auction at the same time they were preparing to request relief from their payment obligations incurred in the C block auction. Although the Commission cannot anticipate when a licensee will become delinquent, the Commission can make clear that delinquency on one Commission obligation will not be without consequence in other Commission auctions. Thus, CIRI urges the Commission to exclude from eligibility for bidding credits in the C block reauction entities (and their affiliates and attributable investors) that are delinquent on any Commission installment payment obligation at the time reauction C block short-form applications are filed.⁹

⁸ See 31 U.S.C. § 3720B(a).

⁹ See 47 C.F.R. § 1.2105(a)(2)(x) (directing that parties filing Form 175 include a "[c]ertification that the applicant is not in default on any Commission licenses and that it is not

C. Tribal Affiliation Rule

Finally, a critical element of the Commission's small business preferences continues to be its affiliation exemption for concerns owned by Alaska Native Corporations and Indian Tribes.¹⁰ Federal law specifically directs the SBA — which has primary jurisdiction over such programs — to calculate the "size" of any entities owned by an Indian tribe "without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe"¹¹ Pursuant to the direction of Congress, the SBA's Rules provide that, for size determination purposes, "concerns owned and controlled by Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601) . . . are not considered affiliates of such entities, or with other concerns owned by these entities solely because of their common ownership."¹² The same exemption is included in the SBA's size standard guidelines for its 8(a) Program.¹³

As part of its detailed use of SBA size standards in the broadband PCS context, the FCC adopted its tribal affiliation

delinquent on any non-tax debt owed to any Federal agency").

^{10.} See 47 C.F.R. § 24.720(1)(11).

^{11.} 15 U.S.C. § 636(j)(10)(J)(ii)(II).

^{12.} 13 C.F.R. § 121.103(b)(2).

^{13.} 13 C.F.R. § 124.112(c)(2)(iii).

rule in 1994 to "mirror[] this congressional mandate."¹⁴ The Commission has reaffirmed this tribal affiliation exemption four times since the Supreme Court's 1995 decision in Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995), recognizing that the exemption is unaffected by the Adarand decision.¹⁵ The SBA also completed a comprehensive overhaul of its small business affiliation rules in which it retained the tribal affiliation exemption on which the Commission's rule is based.¹⁶

Against this background, the Commission's eligibility rules for the C block reauction must include the tribal affiliation exemption featured in Section 24.720(1)(11) of the Commission's Rules. Discussing the SBA rules in 1994, the Commission noted that the employment of its own tribal affiliation exemption "is consistent with these other Federal policies and complies with the congressional mandate in the auction law."¹⁷ In 1995, the Commission explained that its "decision to exempt Indian tribes

¹⁴. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 428 (1994).

¹⁵. See, e.g., Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order, 11 FCC Rcd 7824, 7842 (1996) ("D, E, and F Block Order"); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Sixth Report and Order, 11 FCC Rcd 136, 155-56 (1995) ("Sixth Report and Order").

¹⁶. See 13 C.F.R. § 121.103(b)(2) (1996); 61 Fed. Reg. 3280, 3287 (1996).

¹⁷. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Order on Reconsideration, 9 FCC Rcd 4493, 4494 (1994) (footnotes omitted) ("Broadband PCS Order on Reconsideration").

generally from our affiliation rules was premised on the fact that Congress has imposed unique legal restraints on the way they can utilize their revenues and assets."¹⁸ No party opposed the application of the tribal affiliation exemption to the auctions of broadband PCS F block spectrum¹⁹ in 1996 or wireless communications service ("WCS") spectrum²⁰ in 1997, and the Commission most recently added the exemption to its local multipoint distribution service ("LMDS") auction rules.²¹ For the reasons articulated in these decisions, the Commission must apply its well-justified tribal affiliation rule in connection with its reauction of broadband PCS C block spectrum to be consistent with "other Federal policies and . . . the congressional mandate in the auction law."²²

¹⁸. Sixth Report and Order, 11 FCC Rcd at 156.

¹⁹. D, E, and F Block Order, 11 FCC Rcd at 7840-41.

²⁰. Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, Report and Order, 12 FCC Rcd 10785, ¶ 195 (1997) ("WCS Order").

²¹. Rulemaking To Amend Parts 1, 2, 21, and 25 Of the Commission's Rules to Redesignate The 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services, Order on Reconsideration, FCC 97-166, ¶ 10 (rel. May 16, 1997).

²². Broadband PCS Order on Reconsideration, 9 FCC Rcd at 4494 (footnotes omitted).

III. MINIMUM OPENING BIDS

If the Commission determines that minimum opening bids are in the public interest for the purposes of the C block reauction, CIRI urges the Commission not to set minimum bids at 10 percent of the corresponding high bid from the original C block auctions.²³ Among the public interest objectives articulated in Section 309(j) of the Communications Act are "promoting economic opportunity and competition and . . . avoiding excessive concentration of licenses and . . . disseminating licenses among a wide variety of applicants, including small businesses"²⁴ In the C block context, these objectives — alongside the other policy mandates of Section 309(j) — can best be served with lower minimum bids than those proposed in the FNPRM.

First, from the record developed in the Commission's broadband PCS C block installment payment proceeding, it is evident that certain C block licensees placed bids in the original C block auctions that far exceeded what the market would bear going forward. At the heart of the entire proceeding is the inability of these licensees to make good on their bids once the auction closed. Against this background, the Commission should not gauge the value of the C block reauction against the excessive bids that yielded the reauction in the first place. It is fairly evident that some original C block bids would not be supported in the market, and it would be nonsensical to use these

²³. FNPRM at ¶ 92.

²⁴. 47 U.S.C. § 309(j)(3)(B).

same bids to determine "the relative value of the licenses"²⁵ in a reauction. If the Commission wishes to determine the relative value of the reaucted licenses, it should turn to more accepted, objective population figures, not to uniformly rejected C block excesses.

Moreover, in the FNPRM the Commission proposes the institution a "very small business" preference category "to meet the needs of entities that may be interested in bidding on spectrum surrendered by C block licensees."²⁶ Having proposed a new option to remove barriers to small business participation in the C block reauction, the Commission should not create another barrier in the form of high minimum opening bids. Smaller bidders that cannot afford the Commission's mandatory bid amounts will either avoid the C block reauction altogether or participate in the auction on a more limited basis than originally contemplated. In either case, the Commission will have reversed the gains it will achieve by providing bidding credits for very small businesses and other entrepreneurs.

Finally, limiting the amounts of any newly-established minimum bids would serve the public interest by restricting the probability that the Commission will reduce the selected minimum bid amounts during the LMDS auction.²⁷ In its 800 MHz auction

²⁵. FNPRM at ¶ 92.

²⁶. Id. at ¶ 100.

²⁷. Id. at ¶ 92 (minimum bids will "give us the flexibility to make adjustments based on the competitiveness of the auction").

proceeding, the Commission noted that it would preserve the option of reducing minimum bids in case the Commission "misjudged market conditions by overestimating the value of these licenses."²⁸ Yet, if the Commission were to reduce the minimum bid in a given basic trading area ("BTA") during the auction event, it would undermine standing bids for comparable BTAs. Standing bidders would be disadvantaged for having entered the auction at the Commission's minimum bid price in comparable BTAs, and they would not be permitted to withdraw those bids without facing the Commission's bid withdrawal penalty.²⁹ Limiting the amounts of any newly-established minimum bids will help to avoid the problems of inaccurate license valuation and subsequent minimum bid reduction.

Thus, if the Commission determines that minimum opening bids are in the public interest for the C block reauction, CIRI urges the Commission to adopt minimum bids that are no more than the upfront payment amount for each C block license to be auctioned. If the Commission elects to charge \$0.06 per MHz per pop as an upfront payment for the C block reauction,³⁰ for example, the Commission should utilize that same population-based measure to set the minimum bid for each license. As the Commission reasoned in 1994:

²⁸. Auction of 800 MHz SMR Upper 10 MHz Band, Order, DA 97-2147, ¶ 16 (Wir. Tel. Bur. Oct. 6, 1997).

²⁹. 47 C.F.R. §§ 1.2104(g), 24.704(a).

³⁰. FNPRM at ¶ 94.

We believe that using a formula that bases the size of the upfront payment on the amount of spectrum and population on which a bidder is interested in bidding at any one time is a rational way for the Commission to be provided that each bidder is a bona fide applicant and that each bid is sincere. The size of the upfront payment will thus directly relate to the size and capabilities of the licensed facilities, the cost to construct a system, the value of the licensed spectrum and the potential amounts bidders will bid.³¹

This is the type of objective measure the Commission should employ in setting minimum opening bids. CIRI strongly urges the Commission to utilize a similar formula for minimum opening bids in the C block reauction and not to base any minimum opening bids on the many irrational C block bids that precipitated the reauction in the first instance.

IV. VERY SMALL BUSINESSES AND BIDDING CREDITS

Finally, CIRI supports the Commission's proposal to create a "very small business" bidding category for the C block reauction.³² In its broadband PCS D, E, and F Block Order, the Commission established a "very small business" preference category for businesses with gross revenues not exceeding \$15 million to accommodate the needs of smaller bidders for licenses in that capital-intensive service.³³ Earlier this year, the Commission utilized the "very small business" category for bidding credits in its WCS competitive bidding rules — reasoning

^{31.} Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2378-79 (1994) (emphasis added).

^{32.} FNPRM at ¶ 100.

^{33.} D, E, and F Block Order, 11 FCC Rcd at 7852.

that a tiered preference approach "enhances the discounting of bidding credits because not all entities receive the same benefit"³⁴ — and the Commission later adopted the same structure for its auction of LMDS spectrum.³⁵ CIRC supports the Commission's proposal to duplicate that approach here.

In keeping with that approach, however, CIRC urges the Commission to offer materially increased bidding credits in the C block reauction to compensate for the absence of installment payment plans.³⁶ In the LMDS Second Order on Reconsideration, the Commission determined that "a reasonable adjustment of ten percent for the unavailability of installment payment plans for LMDS licenses" was in order, yielding bidding credits of 45 percent for very small businesses, 35 percent for small businesses, and 25 percent for entrepreneurial businesses.³⁷ As the Commission wrote in its Part 1 Notice of Proposed Rule Making:

We note that substituting a system of larger bidding credits might eliminate the administrative and market concerns associated with installment payments, while

³⁴. WCS Order at ¶ 193.

³⁵. Rulemaking To Amend Parts 1, 2, 21, and 25 Of the Commission's Rules to Redesignate The 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services, Second Order on Reconsideration, FCC 97-323, ¶ 16 (rel. Sept. 12, 1997) ("LMDS Second Order on Reconsideration").

³⁶. See id. at ¶¶ 19-20.

³⁷. Id. at ¶ 20.

nonetheless ensuring opportunities for small businesses to participate in auctions.³⁸

If the Commission elects not to provide installment payment financing in the C block reauction,³⁹ the same policy considerations articulated in the Part 1 Notice of Proposed Rule Making and implemented in the LMDS Second Order on Reconsideration should apply with equal force in the C block context.

Thus, for the reasons set forth in the Commission's prior decisions, CIRI urges the Commission to apply heightened bidding credits in the C block reauction, yielding a 45 percent bidding credit for very small businesses and a 35 percent bidding credit for small businesses. With bidding credits at these levels, responsible small bidders with appropriately-tailored business plans will still be able to secure private market financing in the absence of Commission sponsored installment payment plans. Without bidding credits at these levels, smaller bidders will be limited in their renewed opportunity to become Commission licensees.

³⁸. Amendment of Part 1 of the Commission's Rules - Competitive Bidding Proceeding, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making, 12 FCC Rcd 5686, 5706 (1997).

³⁹. FNPRM at ¶ 101.

V. CONCLUSION

For these reasons, CIRI urges the Commission to establish meaningful opportunities for responsible small bidders in the broadband PCS C block reauction by limiting eligibility for and benefits in the auction to entities that have made good on their Commission obligations, by instituting low minimum opening bids, and by offering materially increased bidding credits for all qualifying bidders.

Respectfully submitted,

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